Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2004

GAYLE M. FRANZEN and GEORGE B. KRAMER,

Petitioners,

v.

MELVIN LEE SMITH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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GAYLE M. FRANZEN and GEORGE B. KRAMER,

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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Gayle M. Franzen and George B. Kramer respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, which affirmed the decision of the United States District Court for the Northern District of Illinois, Eastern Division, ordering the issuance of a writ of habeas corpus in the proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The memorandum opinion of the District Court is incorporated into the opinion of the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on March 21, 1980. A petition for rehearing was not filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a prosecutor's comments during closing arguments, allegedly referring to respondent's pre-trial silence about his alibi defense, are constitutionally erroneous?

STATEMENT OF THE CASE

This case revolves around comments made by the prosecutor in his closing argument at respondent's jury trial for armed robbery. In his petition for a writ of habeas corpus, respondent alleged that these comments impermissibly referred to his pre-trial silence and thus violated his fifth and fourteenth amendment rights.

In 1974, respondent was tried for armed robbery and found guilty. On January 30, 1975 he was sentenced to four years to four years and a day in prison. The Illinois Appellate Court affirmed the conviction, *People* v. *Smith,* 52 Ill. App. 3d. 358, 367 N.E. 2d 756 (1977), and the Illinois Supreme Court denied a petition for leave to appeal on January 26, 1978. The United States Supreme Court denied certiorari on May 1, 1978, *Smith* v. *Illinois,* 436 U.S. 961 (1978). Respondent then sought a writ of habeas corpus from the United States District Court. The writ was granted on August 21, 1979 and the Seventh Circuit Court of Appeals affirmed on March 21, 1980. It is from the affirmance of the granting of the writ that petitioners now seek certiorari.

At trial, the victim of the armed robbery, Claudia Jean Watson, testified that she observed respondent removing money from the cash register. (T. Tr. 179)[1] She further testified that when respondent pointed the gun at her, he was approximately two feet from her, and that she had the opportunity to observe his face for two or three minutes. (T. Tr. 180-1) Shortly thereafter, Ms. Watson had another opportunity to view respondent for an additional forty-five to sixty seconds. (T. Tr. 183) She stated she was positive that respondent was the man[2] who pointed the gun at her. (T. Tr. 181) Her determination of respondent's height, however, was inaccurate. (T. Tr. 176, 233).

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[1] (T. Tr. ____) refers to the page of the trial transcript.

[2] Two other men also participated in the armed robbery. (T. Tr. 173-5)

Respondent presented an alibi defense and he and his girlfriend, Betty Walls, testified they were home together on the night of the robbery. (T. Tr. 214, 233) On cross-examination, Ms. Walls testified that she was uncertain as to which night respondent was home with her and that she was uncertain as to whether or not he was home the week following the robbery. (T. Tr. 216-8) She also stated that a police officer had come to her residence the evening of the trial but that she had not talked to him. (T. Tr. 225) Respondent testified that he told the officer he could talk to Ms. Walls in the presence of respondent's lawyer. (T. Tr. 236).

Part of the closing argument[3] for the prosecution was as follows:

> The defense is alibi. Now, this is a very interesting alibi. I want you all to think what you would do in a situation like this, what you would do, and if you feel that this alibi was handled the way you would handle it I will be surprised.
>
> * * *
>
> In fact, yesterday when we attempted to talk to her [Ms. Walls] about an alibi she wouldn't talk to us, she wouldn't talk to the police officer. Melvin Smith, the same guy that wasn't at the hearing, that hid in the back, maybe, told her not to. If you had what this is supposed to be, an ironclad alibi, you were home with your spouse, or your friend, or your buddy, or girl friend or boy friend and you knew it, one week from the day that the thing happened, had happened on a late Monday, early Tuesday, and you knew on Monday or Sunday next that he was supposed to, wouldn't you run to the police and say: 'Hey, look, he was with me, he didn't do it.'
>
> Which one of you would not? They didn't. They had no obligation to. By the way, they have no obligation to

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[3] The full closing arguments as to the alibi defense are set forth in the District Court's opinion in the Appendix.

> tell us anything, but wouldn't you, if you were innocent and if you had a loved one in trouble, run in and tell the police? You're right, you would.

(T. Tr. 248-50) After defense counsel's closing arguments, the prosecutor made, *inter alia,* the following comments in his rebuttal argument:

> And even when the police were out there to ask her about it she wouldn't talk—or he wouldn't let her talk about it. That's a curious thing. Why, why wouldn't anybody talk about the alibi until we get to Court?

(T. Tr. 264) The jury found respondent guilty of armed robbery. (T. Tr. 281)

At the hearing on respondent's post-trial motion on January 30, 1975, his new counsel raised for the first time his objections to the prosecutor's closing arguments insofar as they were claimed to be impermissible comments upon silence. (H. Tr. 18-26, 66-8, 71-2)[4] The trial judge held that the comments had not violated petitioner's right to remain silent. (H. Tr. 86-7)

The Illinois Appellate Court affirmed the conviction, rejecting respondent's argument that *Doyle* v. *Ohio,* 426 U.S. 610 (1976) was applicable under the facts of the case. *People* v. *Smith,* 52 Ill. App. 3d 583, 592, 367 N.E. 2d 756, 762 (1977). The court found that "an unbiased reading of the entire record clearly reveals that the prosecutor was referring to the [respondent's] undisputed ordering of the witness to refuse to talk to the prosecutor's representative and not of any failure or refusal of the [respondent] himself to speak." *Id.* at 591, 367 N.E. 2d at 762.

On collateral review, however, the District Court and the Court of Appeals disagreed with the state court's determination and held the prosecutor's comments embraced respondent's own pre-trial silence, thus giving rise to constitutional error.

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[4] (H. Tr. ____) refers to the page of the transcript of the post-trial hearing.

Petitioners now bring this petition for a writ of certiorari seeking reversal of the Seventh Circuit's affirmance of the issuance of the writ of habeas corpus.[5]

REASONS FOR GRANTING THE WRIT

I.

THE ISSUE RAISED BY THIS CASE WAS LEFT UNANSWERED BY *DOYLE* V. *OHIO* AND *JENKINS* V. *ANDERSON;* IT SHOULD BE RESOLVED TO PERMIT PROSECUTORIAL CROSS-EXAMINATION AND COMMENT ON A TESTIFYING DEFENDANT'S FAILURE TO MENTION HIS ALIBI BEFORE TRIAL.

Certiorari was granted in *Doyle* v. *Ohio,* 426 U.S. 610, 616 (1976) to decide "whether impeachment use of a defendant's post-arrest silence violates any provision of the Constitution. . ." The question in *Jenkins* v. *Anderson,* ____ U.S. ____, 40 CCH S.Ct. Bull. B2837, B2839 (1980) was "whether the use of prearrest silence to impeach a defendant's credibility violates either the Fifth or Fourteenth Amendments to the Constitution." The issue in the instant case centers on whether a prosecutor's remarks in closing arguments, allegedly referring to respondent's pretrial silence about his alibi defense,[6] give rise to reversible constitutional error. This issue has yet to be decided by the Court. *See Doyle,* 426 U.S. at 616 n. 6. The Seventh Circuit recognized this fact in their opinion, citing the same footnote in *Doyle.* App. at A3.

Petitioners submit that the Seventh Circuit's affirmative answer to this question conflicts with the applicable rationale of *Raffel* v. *United States,* 271 U.S. 494 (1926), a decision whose viability was challenged by the Seventh Circuit but reaffirmed

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[5] Respondent is free on bail pending the disposition of these proceedings.

[6] Petitioners still maintain that the prosecutor's remarks neither embraced, nor were directed towards, respondent's own pretrial silence. *See People* v. *Smith,* 52 Ill. App. 3d 583, 592, 367 N.E.2d 756, 762 (1977).

by this Court in *Jenkins*. *Raffel* held that a defendant's silence at first trial was admissible when he testified in his own defense at his second trial for impeachment purposes without violating the fifth amendment. In *Jenkins*, ____ U.S. at ____ n.4, 40 CCH S.Ct. Bull. B2837 at B2844 n.4, the majority opinion noted that "no Court opinion decided since *Raffel* has challenged its holding that the Fifth Amendment is not violated when a defendant is impeached on the basis of his prior silence." Petitioner submits that the holding in *Raffel* governs the instant case and that the courts below erred in discounting it.

The fact situations in *Raffel* and this case are highly analogous. The defendant in *Raffel* relied on his fifth amendment right in not taking the witness stand at his first trial. Respondent and his alibi witness were silent prior to trial in this case because respondent's trial counsel believed the Illinois Alibi Defense Statute, Ill. Rev. Stat. 1973, ch. 38, § 114-14, was unconstitutional in light of *Wardius* v. *Oregon*, 412 U.S. 470 (1973). Thus, Raffel's silence and respondent's silence were based on interpretations of their constitutional rights but not on specific invocations of those rights. At his second trial when he testified, Raffel's prior silence was properly used to impeach him even though it was based on a constitutional right. Respondent testified in his own behalf at his trial and, assuming *arguendo* the prosecutor's remarks did encompass respondent's prior silence, such remarks properly discredited his alibi defense and did not amount to constitutional error. The Seventh Circuit and the District Court have, in misinterpreting *Raffel*, improperly extended *Doyle*. Correction and clarification should be made by this Court.

Petitioners further suggest that *Doyle* ought to be limited to those custodial or interrogation situations where a suspect has remained silent immediately upon receiving warnings pursuant to *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The rationale of *Dolye* should not be extended to apply to a defendant's non-interrogation strategy of alibi silence until trial.

II.

THE SEVENTH CIRCUIT COURT OF APPEALS ERRED IN ADOPTING THE DISTRICT COURT'S HOLDING THAT CERTAIN PROSECUTORIAL COMMENTS DURING CLOSING ARGUMENTS REFERRED TO RESPONDENT'S PRE-TRIAL SILENCE.

The District Court concluded "that the prosecutor's comments were directed towards the [respondent's] failure to come forward at any time prior to trial with his alibi defense." App. at A13. Petitioners submit this is an erroneous conclusion and that a careful analysis of the facts reveals otherwise.

In his closing argument, the prosecutor sought to emphasize that respondent's alibi witness, by failing to go to the police with the alibi, behaved differently than most people would if the alibi were true. The prosecutor argued that "she didn't turn to the police and say '. . . he couldn't have done it, he was with me,'" and "wouldn't you run to the police and say 'Hey look, he was with me, he didn't do it.'" (T.Tr. 248-250) Immediately thereafter, the prosecutor used the word "they":

> Which one of you would not? They didn't. They have no obligation to tell us anything, but wouldn't you, if you were innocent and if you had a loved one in trouble, run in and tell the police? You're right, you would.

(T.TR. 264)

The Illinois Appellate Court concluded with respect to these comments that "the prosecutor was referring to the [respondent's] undisputed ordering of the witness to refuse to talk to the prosecutor's representative." *People* v. *Smith,* 52 Ill. App.3d 583, 591, 367 N.E. 2d 756, 762 (1977). Although District Court notes that the appellate court's interpretation has

some support in the record,[7] it finds that the appellate court's analysis is not persuasive. App. at A11.

The prosecutor also referred to "if you were innocent" (T.Tr. 250) and "Why, why wouldn't anybody talk about the alibi until we get to court?" (T. Tr. 264)

The District Court notes that neither the Supreme Court nor the Seventh Circuit has yet specifically set forth a test to determine when ambiguous prosecutorial comments will constitute an invasion of the defendant's right to remain silent after arrest. App. at A12. The court then applies the standard followed by the Seventh Circuit in cases where the issue is whether indirect prosecutorial statements constitute impermissible comment upon a defendant's failure to testify. App. at A12. The two-part test is (1) whether the comment is "manifestly intended" to refer to a defendant's silence, or (2) whether the comment is of such a character the jury would "naturally and necessarily" take it to be a comment on a defendant's silence. *United States* v. *Lyon,* 397 F.2d 505, 509 (7th Cir.), *cert. denied,* 393 U.S. 846 (1968). The District Court stated that the prosecutor did not "manifestly intend" to include respondent in his remarks. However, the court found that the jury would "naturally and necessarily" take the remarks to be a comment on respondent's silence. App. at A12.

In the context of the prosecutor's entire argument, his use of the words "they", "if you were innocent", and "anybody" was a mere, inadvertent slip of language, which did not change the focus of his statements to include respondent. Note, for example, the prosecutor's statement, "If you had what this is supposed to be, an ironclad alibi . . . wouldn't you run to the

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[7] The district court states: "Presumably, this conclusion was drawn from the prosecutor's cross-examination of Ms. Walls, T. TR., at 224-227, and petitioner's trial testimony that when the police officer had come to interview Ms. Walls on the day before the trial began, petitioner had instructed the officer that Ms. Walls would only talk to the officer in the presence of petitioner's attorney. T. Tr., at 236." App. at A11.

police and say, 'Hey, look, he was with me, he didn't do it.' " (T.Tr. 250) Nobody who hears such a sentence is going to think that the speaker is referring to respondent.[8] Obviously, the prosecutor was speaking about the witness, not respondent, and simply twisted his words—a common occurrence when a person is composing as he argues instead of reading a prepared statement. Likewise, when the prosecutor used "they", he was not referring to respondent's silence. This is apparent from the context of the entire closing argument. *See United States* v. *Wagner,* 497 F.2d 249 (10th Cir. 1974). (Prosecutor's reference to "his testimony" in closing argument held to be a faulty grammatical reference made during a summation of the evidence.)

This Court has stated:

> . . . .all closing arguments of counsel, are seldom carefully constructed *in toto* before the event; improvision frequently results in syntax left imperfect. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly v. *DeChristoforo,* 416 U.S. 637, 646-647 (1974).

In *United States* v. *Reicin,* 497 F.2d 563, 572 (7th Cir.), *cert. denied,* 419 U.S. 996 (1974), the defendant claimed that he was denied a fair trial because the prosecutor commented, in closing argument, on his failure to take the witness stand. The prosecutor had stated: "Reicin says, through other witnesses, . . ." and "for some reason that only Reicin knows . . .". The

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[8] The district court states that that comment was "focused only upon Ms. Walls' silence, ..." App. at A13.

first statement was used on *several* occasions. In failing to find that the jury would "naturally and necessarily" take the language to be comment on the defendant's failure to testify, the court stated:

> . . . perhaps [the comments are] an inartful locution for a prosecutor who should not only refrain from commenting on the failure of a defendant to take the witness stand but should guard against the appearance of doing so, nevertheless, in the context of the extensive argument in this case we do not read in these introductory remarks the illative meaning that the defendant finds.

Id. at 572.

As in *Reicin,* the prosecutor's comments in the present case may be an "inartful locution," but in the context of the entire argument, the comments do not refer to the respondent's silence; the jury would not "naturally and necessarily" interpret them as such.

Therefore, this Court should grant certiorari to review the conclusions of the District Court and the Seventh Circuit.

III.

THE SEVENTH CIRCUIT COURT OF APPEALS ERRED IN ADOPTING THE DISTRICT COURT'S HOLDING THAT CERTAIN PROSECUTORIAL COMMENTS DURING CLOSING ARGUMENT DID NOT CONSTITUTE HARMLESS ERROR.

This Court has held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California,* 386 U.S. 18, 24 (1967). In the present case, there is not a reasonable possibility that the prosecutor's comments might have contributed to the conviction.

Respondent was positively identified as one of the robbers by Claudia Jean Watson, the night auditor held at gunpoint during the robbery. She had ample opportunity to observe the

robber, having been in a well-lit area, less than four feet away from him, and having looked directly at his face for three to four minutes. (T.Tr. 170-171, 180-183, 193) Ms. Watson concentrated on the robber's features so as to remember them and to be able to later identify him. (T.Tr. 184) Less than a week later, Ms. Watson positively identified respondent from photographs shown to her by police. (T.Tr. 185, 190) These photographs included pictures of two of respondent's brothers. (T.Tr. 29, 30) She subsequently identified respondent in a lineup and at trial. (T.Tr. 181, 189) The fact that there was some discrepancy in height between Ms. Watson's description and respondent is not significant where Ms. Watson was so certain of his face. Her testimony stood up under vigorous cross-examination. (T.Tr. 190-197)

Respondent's alibi witness was his girlfriend, Betty Walls. On cross-examination, Ms. Walls was uncertain as to which night respondent was home with her, although she claimed to know that it was the night of the robbery. She was also unable to recall where respondent had been on any other day that week. (T.Tr. 216-224) Her testimony was substantially impeached at trial. App. at A11.

Because the prosecution witness's identification of respondent was unwavering, petitioners submit that a writ of certiorari should issue to correct the erroneous decision of the District Court and the Seventh Circuit.

IV.

THE DISTRICT COURT SHOULD HAVE ADDRESSED THE QUESTION OF RETROACTIVE APPLICATION OF *DOYLE* V. *OHIO* AND SHOULD HAVE FOUND IT TO BE APPLICABLE PROSPECTIVELY ONLY.

Assuming *arguendo* the fact situation of this case falls within the scope of *Doyle* v. *Ohio,* 426 U.S. 610 (1976), the

District Court should not have concluded that *Doyle* would have been applicable retroactively.[9] App. at A19.

Doyle was decided after respondent's conviction. Clearly *Doyle* is a landmark case which has set forth a new rule of procedure—that an arrested person's post-arrest, post-*Miranda* silence may not be used to impeach an explanation subsequently offered at trial. Many times when a decision of the United States Supreme Court has set forth new rules of criminal procedure, the Court has held that such a rule shall not be given retroactive application.

Several recent trend-setting cases are good examples. *Linkletter* v. *Walker*, 381 U.S. 718 (1965), refused to retroactively apply *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Similarly, in *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), the Court held that *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), were only applicable to trials begun after the dates of those decisions.

In order to determine whether the new rule of procedure is to be given retroactive application, as a threshold matter, the court must determine whether the new rule remedies a significant or a substantial defect in the truth-finding process of trial, a defect which raises serious questions about the accuracy of guilty verdicts in past trials. *Williams* v. *United States*, 401 U.S. 646, 653 (1971); *Bailey* v. *Holley*, 530 F.2d 169, 172 (7th Cir. 1976).

Doyle, a case which involves a defendant's fifth amendment privilege, does not remedy a defect in the truth-seeking function of trial. In *Doyle* this Court upheld a defendant's right not to be impeached at trial by his silence after being given *Miranda* warnings. This Court made no suggestion, however, that the forbidden practice was frustrating the *truth-seeking* function of trial. In fact, this Court recognized the importance of prosecutors being allowed wide leeway in the scope of

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[9] The question of retroactive application of *Doyle* was not raised in the Seventh Circuit.

impeachment on cross-examination so as not to discourage that very function of trial—the ascertainment of truth. *Doyle*, as a threshold matter, therefore, should not be applied retroactively.

Looking next to the balancing criteria regarding retroactive application as set out in *Halliday* v. *United States*, 394 U.S. 831, 832 (1968), it becomes apparent that the *Doyle* decision should apply prospectively only. The *Halliday* criteria considers: 1) the purpose of the new rule; 2) the extent of reliance upon the old rule; and 3) the effect retroactive application would have upon the administration of justice.

To this end, the case of *Tehan* v. *United States*, 382 U.S. 506 (1966), is instructive. *Tehan* ruled that *Griffen* v. *California*, 380 U.S. 609 (1965) should not be applied retroactively. *Griffin* held that a defendant who elects not to testify may not have his silence used against him. Since *Doyle* is an outgrowth of *Griffin*, the *Tehan* court rationale for denying retroactive application to *Griffin* is of special interest. *Tehan* reasoned that:

> The basic purpose of a trial is the determination of truth. . . . By contrast the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different values—reflecting the concern of our society for the right to be let alone.

Tehan, 382 U.S. at 416. The purpose of *Doyle*, to prevent a defendant from being confronted at trial with his past *Miranda* silence, does not compel retroactive application for similar reasons.

As to the effect retroactive application would have, in referring to the number of cases in which a prosecutor may have commented on a defendant's refusal to testify prior to the *Griffin* decision, this Court in *Tehan* noted that retroactive application of *Griffin* would "create stresses upon the administration of justice more concentrated but fully as great as would have been created by a retroactive application of *Mapp*." *Tehan*, 382 U.S. at 418. Doubtless there have been innumer-

able criminal trials during which the prosecutor made some reference to a defendant's post-arrest silence. To subject these convictions to collateral attack would place a serious burden on our criminal justice system.

Finally, it is suggested that a prosecutor could not have reasonably been expected to have foreseen the change in criminal law that *Doyle* brought. His reliance on the law in effect at the time of trial would be reasonable and there is no compelling reason to hold the state to a stricter rule which took effect at a later date.

For these reasons, *Doyle* should be applied prospectively only.

CONCLUSION

For all these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 79-2107

UNITED STATES OF AMERICA ex rel. MELVIN LEE SMITH,
Petitioner-Appellee,

v.

CHARLES J. ROWE and WILLIAM KLUSAK,
Respondents-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-C-2853—**Hubert L. Will**, *Judge.*

ARGUED FEBRUARY 13, 1980—DECIDED MARCH 21, 1980

Before FAIRCHILD, *Chief Judge*, SWYGERT and CUMMINGS, *Circuit Judges.*

PER CURIAM. The primary issue is whether a prosecutor's comments about a defendant's failure to inform law enforcement authorities of his alibi defense violated his constitutional privilege against self-incrimination and his right to due process. Additional issues are: (1) whether the trial court was correct in finding that the prosecutor's summation to the jury referred to the defendant's pretrial failure to bring forth his alibi defense and (2) whether the harmless error doctrine neutralizes the constitutional impairment if it existed.

Petitioner-appellee Melvin Lee Smith requested the district court, under 28 U.S.C. § 2254, to issue a writ of

habeas corpus, alleging that his state court conviction for robbery was void on constitutional grounds. The district court vacated the judgment of conviction, but it withheld the issuance of the writ for a period of 120 days so as to afford the State of Illinois an opportunity to initiate a new trial proceeding. This appeal by the respondents, Charles J. Rowe, Director, Illinois Department of Corrections, and William Klusak, Sheriff, Kane County, Illinois, followed.*

Petitioner was indicted in June 1974 by a Kane County grand jury for the armed robbery on March 26, 1974 of Claudia Watson, the night auditor of the Hilton Hotel in Aurora, Illinois. He was found guilty by a jury and was sentenced to a term of four years imprisonment. At the trial, defense witness Betty Walls, who was living with petitioner at the time of the robbery, testified that she and the petitioner were home that evening playing cards. During cross-examination the witness testified that a police officer came to her residence the evening before petitioner's trial on September 30, 1974, but she refused to talk to the officer. The petitioner was also present, according to her testimony. Petitioner, testifying in his own behalf, stated that he and Walls were home on the night of the robbery. He also testified that when the police officer came to interview Walls on the eve of the trial, he told the officer that he could talk to Walls only in the presence of petitioner's lawyer.

During the State's closing and rebuttal arguments, the prosecutor made comments which are the basis of the instant habeas petition (*see* n. 1 of the district court's memorandum opinion which is appended).

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* The date of the judgment of conviction was January 30, 1975. The Illinois Appellate Court, Second Division, affirmed the conviction on September 16, 1977, *People v. Smith*, 52 Ill. App.3d 358, 367 N.E.2d 756 (1977), and the Illinois Supreme Court, on January 26, 1978, denied a petition for leave to appeal to that court. The Supreme Court denied certiorari on May 1, 1978, *Smith v. Illinois*, 436 U.S. 961 (1978). Thereafter this habeas proceeding was initiated. The petitioner was freed on bail during the pendency of the state court appeals and is presently free on bail pending the disposition of this proceeding.

Judge Will wrote a thorough opinion explicating his determinations. After considering the respective contentions of the parties, we are satisfied with the judge's reasoning and the result he reached. We therefore adopt his opinion as our own (*see* Appendix) with these additional comments.

Although *Doyle v. Ohio*, 426 U.S. 610 (1976), concerned a situation different from that presented here, it has an important bearing on the primary question before us. In *Doyle* the prosecution sought to impeach the defendant's testimony by questioning the defendant about his failure to reveal exculpatory conduct on his part to narcotics agents at the time of his arrest and after receiving *Miranda* warnings. Here there were no *Miranda* warnings given to petitioner when the police attempted to interview Walls on the eve of the trial. At that time, both she and the petitioner remained silent except for the latter's statement that Walls would afford an interview if petitioner's lawyer was present.

It seems clear that the Supreme Court in *Doyle* left open the very question presented in the instant case. *Doyle, supra*, 426 U.S. at 616 n. 6. The State argues that given this posture, *Raffel v. United States*, 271 U.S. 494 (1926), should control and that the prosecutor's remarks do not constitute error. We are convinced, however, that *Raffel* is factually and legally distinguishable from the present case. In *Raffel* there were two trials; here there was only one trial. Defendant Raffel made his decision to remain silent in a trial setting. In his second trial, he denied making the exact statement offered at the first trial. Here Melvin Lee Smith exercised his constitutional right to remain silent prior to his one and only trial. Moreover, we believe absent an alibi statute that passes constitutional muster, *Wardius v. Oregon*, 412 U.S. 470 (1973), there was no obligation on Smith or Walls to inform the police or the prosecution of the alibi. In such circumstances, it was impermissible for the prosecutor to argue that their pretrial silence discredited their story told on the witness stand. Due process proscribes such prosecutorial conduct.

What we have just stated serves as a predicate for the constitutional error asserted by petitioner: the comments of the prosecutor on the failure of the petitioner to furnish his alibi defense to the police at any time before his trial. We see no legal distinction between the comments by the prosecutor to the jury and any attempt he might have undertaken to impeach petitioner or Walls on cross-examination. *Cf. Griffin v. California*, 380 U.S. 609 (1965); *Doyle v. Ohio*, 426 U.S. 610, 633-36 (1975) (Stevens, J., *dissenting*).

In respect to the other issues, we are convinced that Judge Will was correct in his determinations.

The order granting the writ is affirmed.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. MELVIN LEE SMITH,
Petitioner,

v.

CHARLES J. ROWE, Director, Illinois Department of Corrections, and WILLIAM KLUSAK, Sheriff, Kane County, Illinois,

Respondents.

No. 78 C 2853

MEMORANDUM OPINION

Petitioner Melvin Lee Smith brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on the ground that the state court prosecutor committed constitutional error in his closing argument to the jury and that such error was not harmless beyond a reasonable doubt. Specifically, petitioner contends that the prosecutor commented upon petitioner's failure to come forward prior to trial with the alibi to which petitioner testified at trial, and that such comment constituted impermissible impeachment by use of post-arrest silence in contravention of *Doyle v. Ohio*, 426 U.S. 610 (1976).

This case comes before the Court on respondent's motion to dismiss and petitioner's motion for summary judgment. While this is a close case insofar as the existence of constitutional error is concerned, for the

reasons hereinafter stated we grant petitioner's motion for summary judgment and grant the writ.

BACKGROUND

Petitioner was tried in the Circuit Court of Kane County on September 30 and October 1, 1974 on the charge of having committed an armed robbery at the Hilton Inn in North Aurora, Illinois on March 26, 1974. At trial, petitioner advanced an alibi defense and both he and his girl friend, Ms. Betty Walls, testified that they had been home together on the night of the robbery. After the close of the evidence, the prosecutor made the following statements in his initial closing argument:

> The defense is alibi. Now, this is a very interesting alibi. I want you all to think what you would do in a situation like this, what you would do, and if you feel that this alibi was handled the way you would handle it I will be surprised.
>
> * * *
>
> In fact, yesterday when we attempted to talk to her [Ms. Walls] about an alibi she wouldn't talk to us, she wouldn't talk to the police officer. Melvin Smith, the same guy that wasn't at the hearing, that hid in the back, maybe, told her not to. If you had what this is supposed to be, an ironclad alibi, you were home with your spouse, or your friend, or your buddy, or girl friend or boy friend and you knew it, one week from the day that the thing happened, had happened on a late Monday, early Tuesday, and you knew on Monday or Sunday next that he was supposed to, wouldn't you run to the police and say: 'Hey, look, he was with me, he didn't do it.'
>
> Which one of you would not? They didn't. They had no obligation to. By the way, they have no obligation to tell us anything, but wouldn't you, if you were innocent and if you had a loved one in trouble, run in and tell the police? You're right, you would.

Trial Transcript (T.Tr.), at 248-250. Following defense counsel's closing argument, the prosecutor made the following comments in his rebuttal argument with respect to the alibi defense:

> And even when the police were out there to ask her about it she wouldn't talk—or he wouldn't let her talk about it. That's a curious thing. Why, why wouldn't anybody talk about the alibi until we get to Court?

T.Tr., at 264. The jury found petitioner guilty of armed robbery.

Subsequent to petitioner's conviction, petitioner retained different counsel for the purpose of filing post-trial motions. Post-trial motions were heard by the trial judge on January 30, 1975. During the hearing, petitioner's new counsel raised for the first time his objection to the prosecutor's closing arguments insofar as the comments upon petitioner's prior silence were concerned. Hearing Transcript (H.Tr.), at 18-26, 66-68, 71-72. The trial judge concluded, however, that the prosecutor's closing argument had not violated the petitioner's right to remain silent. H.Tr., at 86-87. Petitioner was sentenced to four years and one day imprisonment.

Petitioner appealed his conviction to the Appellate Court of Illinois, Second Judicial District. *People v. Smith*, 52 Ill.App.3d 358, 367 N.E.2d 756 (2d Dist. 1977). One of the issues raised on appeal was whether petitioner's constitutional privilege against self-incrimination had been violated by the prosecutor's closing arguments to the jury. Rejecting petitioner's reliance upon *Doyle v. Ohio*, *supra*, the appellate court concluded that

> [a]n unbiased reading of the entire record clearly reveals that the prosecutor was referring to the defendant's undisputed ordering of the witness to refuse to talk to the prosecutor's representative and not of any failure or refusal of the defendant himself to speak.

52 Ill.App.3d at 591, 367 N.E.2d at 762. The Illinois Supreme Court denied leave to appeal, and the United States Supreme Court denied certiorari. *Smith v. Illinois*, 436 U.S. 961 (1978). This habeas corpus petition followed.

VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS

Petitioner contends that the prosecutor's comments in closing argument impermissibly referred to petitioner's pretrial silence and thereby violated both his fifth amendment right to remain silent and his due process rights. In the context of this case, petitioner's argument raises two important questions: (1) were the prosecutor's comments directed towards *petitioner's* failure to come forward with the alibi defense, and (2), if so, does the prosecutorial comment on the petitioner's failure to come forward constitute constitutional error?

Insofar as the first of these questions is concerned, a fair reading of the trial transcript and the closing arguments by both the prosecutor and petitioner's trial counsel indicates that the primary focus of the prosecutor's comments insofar as petitioner's alibi defense was concerned was toward Ms. Walls' failure to give a similar story to the police *at any point* prior to trial.[1] In

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[1] Since these comments can only be interpreted within the context of the full closing arguments as to the alibi defense issue, these portions of the arguments are set forth.

Initial closing argument for the prosecution:

> The defense is alibi. Now, this is a very interesting alibi. I want you all to think what you would do in a situation like this, what you would do, and if you feel that this alibi was handled the way you would handle it I will be surprised.
>
> Okay. They say that here is Melvin Smith living with Betty, that they have been living together for awhile, that he stays home on a regular basis, that he's not working and she's not working, so they must be getting along pretty good if you're going to stay in because it's pretty tough to stay in the house day in and out. They have

(Footnote continued on following page)

[1] *continued*

enough feeling for one another. They live together, play cards together, stay together even though they're not married.

Okay. That when she finds out that he is arrested for this offense, the day she found out she claims it was Sunday, he says it was Monday, she's a little mixed up on her days, but when she found out she didn't turn to the police and say: 'For Godsake, he couldn't have done it, he was with me.' No, this alibi couldn't come out right then and there.

In fact, yesterday when we attempted to talk to her about an alibi she wouldn't talk to us, she wouldn't talk to the police officer. Melvin Smith, the same guy that wasn't at the hearing, that hid in the back, maybe, told her not to. If you had what this is supposed to be, an ironclad alibi, you were home with your spouse, or your friend, or your buddy, or girl friend or boy friend and you knew it, one week from the day that the thing happened, had happened on a late Monday, early Tuesday, and you knew on Monday or Sunday next that he was supposed to, wouldn't you run to the police and say: 'Hey, look, he was with me, he didn't do it.'

Which one of you would not? They didn't. They had no obligation to. By the way, they have no obligation to tell us anything, but wouldn't you, if you were innocent and if you had a loved one in trouble, run in and tell the police? You're right, you would.

T.Tr., at 248-250.

Closing argument for the defense:

So, coupled with that we have got what Mr. Puklin refers to as the alibi defense, and legally that's what it's called is an alibi defense. Now, alibi has a bad connotation, or at least to me it sounds bad, alibi, but that's what it's called.

And sure, when I was picking you people on the jury, when Mr. Puklin was picking you I asked you questions now about what if we don't put on any evidence, what if Melvin doesn't testify, and that's because that's a very difficult choice for me to make. I put this girl on the stand, she's never been in Court before, she's not an experienced witness by any means. I don't know what Mr. Puklin is going to be able to do to her, what a skillful cross examiner is going to get her to say.

(Footnote continued on following page)

so arguing, the prosecutor clearly sought to impeach Ms. Walls' veracity as a witness in support of petitioner's

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[1] *continued*

> I submit to you that had Mr. Puklin enough time or the desire to do so he could have had her confused about her name. But we do have her here saying: 'I was living with Melvin, we were staying together, he was home that night.' We have Melvin saying he was home that night. Mr. Puklin says: 'Okay, why didn't you tell the police? You would have all told the police.' I have no doubt in my mind that every one of you would have gone to the police and said: 'Hey, you get him out, he didn't do it, he was with me.'
>
> Well, just for a minute pretend that you're in your early twenty's, and your're black, and you're living in Aurora and you have a boy friend charged with armed robbery and you know he was with you. Are you going to the police and say: 'Hey, that's my boy friend, he was with me, you guys are wrong?' Of course you're not. It's unfortunate, but if you're black and you're that age and you're in Aurora the police are on the other side, they're not on your side, so you don't run to the police and tell them your story, probably would rather stay out of the whole thing.

T.Tr., at 256-57.

Rebuttal closing argument for the prosecution:

> Okay. Doubt has to be a reasonable one. I think what you saw here was a man who has been identified, who has been captured and a loved one doing whatever she can to get him out of this. I believe they have both lied under oath. I don't believe the doubt they have tried to create is a reasonable doubt in light of what you would do if you had an ironclad alibi for a loved one.
>
> And, you know, I don't go this bit about she being twenty years old, and black, and on Aid in Aurora and the police hate people that are black. I don't care what color you are, if you got an ironclad alibi it doesn't hurt to walk downtown and tell the police, they're not going to do anything to you.
>
> And even when the police were out there to ask her about it she wouldn't talk—or he wouldn't let her talk about it. That's a curious thing. Why, why wouldn't anybody talk about the alibi until we get to Court?

T.Tr., at 263-64.

alibi defense.[2] Notwithstanding the prosecutor's primary focus upon impeaching Ms. Walls' testimony, it is clear that on several separate occasions during his closing arguments, one of which was of significant duration, the prosecutor's language literally embraced both petitioner and Ms. Walls.

The Illinois Appellate Court concluded with respect to these comments that "the prosecutor was referring to the defendant's undisputed ordering of the witness to refuse to talk to the prosecutor's representative." *People v. Smith, supra*, 52 Ill.App.3d at 591, 367 N.E.2d at 762. Presumably, this conclusion was drawn from the prosecutor's cross-examination of Ms. Walls, T.Tr., at 224-227, and petitioner's trial testimony that when the police officer had come to interview Ms. Walls on the day before the trial began, petitioner had instructed the officer that Ms. Walls would only talk to the officer in the presence of petitioner's attorney. T.Tr., at 236.

While the appellate court's interpretation of the prosecutor's comments has some support in the record, we do not find the appellate court's analysis persuasive. 28 U.S.C. § 2254(d)(8). In his comments preceding his repeated references to "they", T.Tr., at 250, the prosecutor had discussed broadly Ms. Walls' failure to come forward *at any time* prior to the trial, as well as discussing Ms. Walls' failure to come forward on the day prior to her actual testimony. In addition, he also referred to "if you were innocent", T.Tr., at 250, and "Why, why wouldn't *anybody* talk about the alibi until we get to Court?" T.Tr., at 264 (underscoring supplied). Viewing the prosecutor's comments as a whole, they are clearly susceptible of being interpreted as referring to both petitioner and Ms. Walls' failures to come forward at any time before trial.

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[2] Petitioner does not here challenge the constitutionality of the impeachment of a defense witness by that witness' prior silence, nor do we perceive any constitutional defect in such prosecutorial comment in this case. *See United States v. Fouras*, 497 F.2d 1115, 1120, (7th Cir. 1974); *Shadd v. United States*, 423 F.Supp. 511, 514 (W.D. Pa. 1976).

Notwithstanding our conclusion that the prosecutor's literal language also embraced the defendant's pretrial silence, the question remains whether these comments are, for purposes of constitutional analysis, to be deemed a reference to the defendant's prior silence. Neither the Supreme Court nor the Seventh Circuit has yet specifically set forth a test to determine when ambiguous prosecutorial comments will constitute an invasion of the defendant's right to remain silent after his arrest. However, at least one circuit has ruled with respect to *Doyle*-type situations that a comment is deemed to be such a reference if either (1) it was the prosecutor's manifest intention to refer to the defendant's silence, or (2) the remark was of such a character that the jury would "naturally and necessarily" take it to be a comment on the defendant's silence. *United States v. Edwards*, 576 F.2d 1152, 1154 (5th Cir. 1978). This standard is identical to that followed by the Seventh Circuit in cases where the issue is whether indirect prosecutorial statements constitute impermissible comment upon the defendant's failure to testify at trial, *United States v. Muscarella*, 585 F.2d 242, 249 (7th Cir. 1978); *United States v. Buege*, 578 F.2d 187, 188 (7th Cir. 1978); *United States v. Lyon*, 397 F.2d 505, 509 (7th Cir. 1968), and we see no reason why the same standard should not be equally applicable here.

Evaluating the challenged comments by reference to this standard, we cannot conclude that they were "manifestly intended" to refer to petitioner's silence. There are indications that the prosecutor's choice of words was not accidental and might well have been intentional, particularly in his repeated use of the word "they." T.Tr., at 250. However, in light of the dominant focus of the closing arguments on the impeachment of Ms. Walls and of the fact that the prosecutor did not cross-examine petitioner with respect to his failure to come forward at any time prior to trial, we cannot conclude that he "manifestly intended" to include petitioner in his remarks. Notwithstanding this conclusion, we find the prosecutor's remarks to be of such a character that the jury would "naturally and necessarily" take them to be a comment on the defendant's

silence. Repetition of the word "they", in contrast to the immediately prior comments which were focused only upon Ms. Walls' silence, is juxtaposed so as to call the jury's attention to the petitioner's as well as Ms. Walls' silence. Moreover, while the reference to "anybody" in the rebuttal argument is of lesser importance and of itself would be inadequate to justify a finding of improper comment, *see United States v. Aldridge*, 484 F.2d 655, 660 (7th Cir. 1973) (single ambiguous comment held not to warrant reversal), the implicit reference of this word to both Ms. Walls and petitioner and the arguable reference of this clause to their joint silence up until trial reinforced the comment upon petitioner's silence contained in the preceding comments.

This is a close case. Moreover, we recognize that defense counsel's failure to object at the time of the prosecutor's closing argument is a factor to be weighed in deciding whether or not the prosecutor's remarks are to be considered as improper comments. *See United States v. Hansen*, 583 F.2d 325, 331 (7th Cir. 1978); *United States v. Reicin*, 497 F.2d 563, 573 (7th Cir. 1974); *United States v. Lyon*, *supra*, 397 F.2d at 509.[3] Nonetheless, we find that these closing arguments would naturally and necessarily be taken by the jury as a comment on the defendant's failure to come forward prior to trial with notice of his alibi defense.

Having concluded that the prosecutor's comments were directed towards the petitioner's failure to come forward at any time prior to trial with his alibi defense, the question remains whether these comments constitute constitutional error. Petitioner relies primarily on *Doyle v. Ohio*, *supra*, and *Hale v. United States*, 422 U.S. 171

[3] In addition to failing to object to these comments on the petitioner's pretrial silence, petitioner's trial counsel failed to object to two other prosecutorial comments during closing argument which comments were found by the Illinois Appellate Court to have been error. *See People v. Smith*, *supra*, 52 Ill.App.3d at 589-90, 367 N.E.2d at 760-61. Under such circumstances, we are reluctant to give counsel's failure to object significant weight.

(1975) in support of his contention that these comments were constitutional error. However, a careful reading of these decisions shows that, while important to analyzing whether or not the prosecutor's comments in this case constituted constitutional error, neither controls this case.

In *Hale*, the Supreme Court, exercising its supervisory powers over the lower federal courts, held on non-constitutional grounds that a defendant's silence at the time of arrest and during police interrogation lacked significant probative value and that "any reference to silence under such circumstances carried with it an intolerably prejudicial impact." 422 U.S. at 180. In *Doyle*, the Supreme Court extended the *Hale* rationale, and held that use of a defendant's silence at the time of arrest and after having received *Miranda* warnings to impeach the defendant's exculpatory story given for the first time at trial violated due process. In so holding, the Court adduced two reasons in support of its constitutional rule. First, as set forth in *Hale*, the ambiguity of post-arrest, post-*Miranda* warning silence was so great as to deprive the silence of significant probative value. 426 U.S. at 617. Second, since the *Miranda* warnings themselves implicitly assured the defendant that his silence would not be used against him, it would be fundamentally unfair to later allow use of the silence to impeach an exculpatory explanation. 426 U.S. at 618.

While *Doyle* established a constitutional rule based on the due process clause against impeachment use of a defendant's silence while under arrest and after having received *Miranda* aarnings, the Court was careful to specify that it did not consider other constitutional claims raised by the petitioners. 426 U.S. at 616 n.6. The Court specifically noted that it did not reach petitioners' claim, essentially identical to that raised here by petitioner Smith, that constitutional error had been committed by the prosecutor's cross-examination and comment in closing argument directed towards the petitioners' failure to have told their exculpatory story at any time prior to trial. *Id.* Moreover, the Court noted that "different considerations" would be involved in such a case. *Id.*

To this Court's knowledge, no federal court has endeavored since *Doyle* to analyze the "different considerations" which are at play when the prosecutorial comment is directed towards the defendant's general failure to come forward and give notice of his alibi prior to trial.[4] Some guidance as to the constitutional considerations at play in this situation may be gleaned, however, from the dissenting opinion in *Doyle*.

Justices Stevens, Blackmun, and Rehnquist, dissenting in *Doyle*, would have reached the constitutional issue reserved by the majority and at stake in this case and would have resolved this issue adversely to the petitioners. Relying primarily on the continued existence of *Raffel v. United States*, 271 U.S. 494 (1926), in which the Court had held that a defendant's failure to take the stand at his first trial could be used to impeach the defendant on cross-examination when the defendant took the stand in his second trial, these justices would have concluded that, until *Raffel* is expressly overruled, a state court is free to "regard the defendant's decision to take the stand as a waiver of his objection to the use of his . . . failure to offer his version of the events prior to trial." 426 U.S. at 633 (Stevens, J., dissenting). Notwithstanding this conclusion, the dissenting justices expressed serious doubts as to the probative value of a defendant's decision not to divulge his defenses prior to trial. *Id.*, at 631-632.

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[4] Several federal courts have explicitly noted that the Supreme Court reserved decision in *Doyle* upon whether the defendant's general silence in failing to come forward prior to trial with a story told at trial can be used for impeachment purposes. *United States v. Mireles*, 570 F.2d 1287, 1292 n.8 (5th Cir. 1978); *Hayton v. Egeler*, 555 F.2d 599, 602 (6th Cir. 1977). *Cf. Pineda v. State of Florida*, 564 F.2d 1163, 1165 (5th Cir. 1977) (need not decide whether *Doyle* should be extended to silence at a preliminary hearing).

At least one state court, relying on the reserved issues in *Doyle*, has concluded on the authority of *Raffel v. United States*, 271 U.S. 494 (1926), that a defendant's silence at a preliminary hearing can be used to impeach his testimony at trial. *Franklin v. State*, No. 57,348 (Tex.Crim.App. May 24, 1978) (en banc). This decision was reached over a vigorous dissent, and has been criticized. 10 St. Mary's L.J. 632 (1979).

While the dissenting opinion in *Doyle* points toward a finding of no constitutional error in this case, we conclude that the "different considerations" present in this case do not prevent the error from attaining constitutional proportions. In fact, considerations precisely parallel to the two rationales articulated by the *Doyle* majority are present in this case. First, as a general matter, a defendant's failure to come forward prior to trial with an alibi defense is certainly no less "insolubly ambiguous" than is the defendant's silence at the time of arrest. Where the defendant has been given *Miranda* warnings and been thereby apprised of the fact that his statements could be used against him, where the defendant retains his fifth amendment privilege against self-incrimination, and where the defendant has counsel who might well have encouraged him to say nothing to the prosecution with respect to his possible defenses, the defendant's failure in the usual case to come forward with an alibi defense is certainly not significantly inconsistent with his testimony as to the alibi defense at trial. Moreover, while the record in this case is sparse since the prosecutor never cross-examined petitioner with respect to his failure to give the alibi defense before the trial, the record clearly demonstrates that petitioner's trial counsel had deliberately withheld giving the prosecutor notice of the petitioner's alibi defense.[5] Under such circumstances, petitioner's pretrial failure to come forward with his alibi defense is of extremely questionable probative value, while its potential for prejudice can hardly be doubted.

Second, even assuming the continuing viability of the *Raffel* decision,[6] the prosecutorial comments directed

[5] *See* T.Tr., at 3-22.

[6] The *Raffel* decision has clearly been substantially circumscribed insofar as it is applicable in federal courts. *See United States v. Hale, supra*; *Stewart v. United States*, 366 U.S. 1 (1961); *Grunewald v. United States*, 353 U.S. 391 (1957). The Supreme Court in *Hale* specifically noted that since its decision was reached on nonconstitutional grounds, there was no need to decide whether *Raffel* was viable constitutional law. 422 U.S. at 175 n.4. Under such circumstances, the continued viability of *Raffel* is clearly questionable. *United States v. Vega*, 589 F.2d 1147, 1152 n.3 (2d. Cir. 1978).

towards the petitioner's failure to come forward prior to trial with his alibi violated fundamental fairness. While this case is distinguishable from *Doyle* in that the silence addressed by the comment was not solely that during the post-*Miranda* warning, post-arrest period, the fact that *Miranda* warnings are given and that a criminal defendant retains his fifth amendment right against self-incrimination is of continuing relevance to the fact of a defendant's silence throughout the pretrial period. Moreover, in this specific case, the record clearly demonstrates that petitioner's trial counsel deliberately withheld giving notice of the alibi defense and the identity of the alibi witness until the day of trial. In making this deliberate choice, the petitioner's counsel relied on his conclusion that under *Wardius v. Oregon*, 412 U.S. 470 (1973), the Illinois Alibi Defense statute, Ill. Rev. Stat. ch. 38, § 114-14, was unconstitutional in its failure to provide reciprocal discovery by the defendant once the defendant had provided notice of his alibi.[7] Under such circumstances, we believe it was fundamentally unfair and a denial of due process for petitioner's silence to be used to attack his alibi offered at trial. *See Moore v. Black*, 527 F.2d 1, 3-4 (6th Cir. 1975); *United States v. Brinson*, 411 F.2d 1057, 1060 (6th Cir. 1969). *Cf. United States v. Franklin*, 586 F.2d 560, 570 (5th Cir. 1978) (questions directed towards revealing a defendant's general pre-trial silence are improper); *United States v. Meneses-Davila*, 580 F.2d 888, 891 (5th Cir. 1978) (without consideration of "different considerations," held prosecutorial inquiry as to defendant's general pretrial silence as to exculpatory story given at trial to be a "blatant" violation of *Doyle*).

Accordingly, we hold the prosecutor's comments in closing argument which called the jury's attention to petitioner's pretrial silence with respect to his alibi to be constitutional error.

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[7] *See* T.Tr., at 3-22. The argument as to the unconstitutionality was upheld in *People v. Fields*, 59 Ill.2d 516, 322 N.E.2d 33 (1975). *See also United States ex rel. Hairston v. Warden*, 597 F.2d 604, 608 (7th Cir. 1979); *Allison v. Gray*, No. 77-1543 (7th Cir. July 30, 1979).

HARMLESS ERROR

Notwithstanding our conclusion that the prosecutor's comments were constitutional error, respondent contends that such error was harmless beyond a reasonable doubt as required by *Chapman v. California*, 386 U.S. 18, 24 (1967). In light of the evidence presented at trial, we cannot agree.

The evidence presented at petitioner's state court trial, while clearly sufficient to sustain the jury verdict of guilty, *see People v. Smith*, *supra*, 52 Ill.App.3d at 588, 367 N.E.2d at 760, was not exceedingly strong. The prosecution's only substantive witness was the robbery victim who testified that she had viewed the defendant during the course of the robbery for two or three minutes. While the lighting was good, the victim testified that the robber had been wearing a wide brimmed hat which cast shadows over a portion of his face. Moreover, the victim originally described the robber as 5'8" tall, while in fact petitioner is 6'2". Five days after the robbery, the victim picked the petitioner's picture out from a set of 8 or 9 photographs. She again identified petitioner at a line-up of 9 or 10 men some four months later, but at this line-up all of the men were seated thereby preventing a test of the victim's recollection of the robber's height. The only other prosecution witness testified to having witnessed the line-up at which the victim identified the petitioner. In opposition to this testimony, both Ms. Walls and petitioner testified that they had been home together on the night of the robbery.

In determining whether the error was harmless beyond a reasonable doubt, the question is whether there is a reasonable possibility that the error might have contributed to the conviction. *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963). In a trial like petitioner's, the credibility of the witnesses and of the defendant are of crucial significance. While Ms. Walls' testimony in support of petitioner's alibi was substantially impeached at trial, we cannot conclude that the petitioner's alibi defense was transparently frivolous. Under all of the circumstances, where the jury would "naturally and

necessarily" have taken the prosecutor's closing arguments as an effort to impeach petitioner's credibility and alibi defense by virtue of his pretrial silence, we cannot conclude that the error was harmless beyond a reasonable doubt.[8] *See United States ex rel. Allen v. Rowe*, 591 F.2d 391, 393 (7th Cir. 1979); *Chapman v. United States*, 547 F.2d 1240, 1249 (5th Cir. 1977). Petitioner is entitled to a new trial.[9]

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[8] Respondents have also argued that the comments were harmless beyond a reasonable doubt by virtue of certain jury instructions given by the trial judge to the jury. Specifically, respondents rely upon the instructions that the jury must find petitioner guilty beyond a reasonable doubt from the evidence presented at trial, and that the arguments of counsel were not evidence. T.Tr., at 268, 275-76.

Under some circumstances, jury instructions may have a curative effect upon prior error in referring to a defendant's silence. *See United States v. Hansen, supra*, 583 F.2d at 332. However, this rule is by no means absolute. *United States v. Buege, supra*, 578 F.2d at 189; *United States v. Edwards, supra*, 576 F.2d at 1154. The instructions relied upon here by respondent were general in nature and were not directed toward the specific issue of whether petitioner could properly be impeached by his pretrial silence. In fact, a reading of the entire jury instructions shows that at no time was this constitutional problem addressed. We therefore find no basis for concluding that the jury instructions rendered the constitutional error harmless beyond a reasonable doubt.

[9] Since the Supreme Court's holding in *Doyle* expressly reserved judgment in a case such as this one, we need not address respondents' argument that *Doyle* should not be applied retroactively.

Assuming *arguendo* that the issue of *Doyle's* retroactivity was necessary to a decision of this case, we would find *Doyle* retroactive. While no federal decision has to this Court's knowledge yet decided the question of whether *Doyle* should be given full retroactive effect, several decisions have intimated that *Doyle* is to be considered applicalbe to those cases which were on appeal at the time of the *Doyle* decision. *See Chapman v. United States*, 547 F.2d 1240, 1246-47 (5th Cir. 1977); *United States v. Lenardo*, 420 F.Supp. 1148, 1157 (D. N.J. 1976), *remanded without pub. op.*, 542 F.2d 1168 (3d Cir. 1976). The Seventh Circuit has recently affirmed habeas corpus relief on *Doyle* grounds for an Illinois prisoner whose

(Footnote continued on following page)

[9] *continued*
conviction had been affirmed by the Illinois Appellate Court shortly before *Doyle* was decided, *United States ex rel. Allen v. Rowe, supra*, though this question was reached without discussion of the retroactivity question.

While this limited authority supports the conclusion that *Doyle* should be given retroactive effect at least to cases on direct appeal at the time of the *Doyle* decision, *see United States v. Fitzgerald*, 545 F.2d 578, 582 (7th Cir. 1976), explicit consideration of the criteria set forth by the Supreme Court in *Stovall v. Denno*, 388 U.S. 293 (1967), supports the conclusion that *Doyle* be given retroactive effect. Insofar as the *Doyle* decision rests upon the extension of the rationale of *Hale* of ensuring that only probative evidence will be used at trial, the "purpose" of the *Doyle* rule is directed towards the reliability of the truth-finding process at trial. Such a purpose has sometimes been held a sufficient condition to infer retroactivity. *See Chapman v. United States*, 547 F.2d 1240, 1247 n.12 (5th Cir. 1977).

Respondents contend, however, that the question of *Doyle*'s retroactivity should be analyzed by reference to *Tehan v. Shott*, 382 U.S. 406 (1966), which denied full retroactive effect to *Griffin v. California*, 380 U.S. 609 (1965). While it is clear that the *Griffin* decision was in part premised upon the accuracy of the truth-finding process, *see Johnson v. New Jersey*, 384 U.S. 719, 729 (1966), the decision in *Tehan* to deny retroactivity was based upon the weight of the remaining factors in the *Stovall* analysis, i.e., the extent of reliance upon the old rule and the effect on the administration of justice of a retroactive application of the new rule. 388 U.S. at 297. Unlike the Supreme Court's findings in *Tehan* with respect to retroactive application of *Griffin*, we do not believe that either of these remaining factors presents a serious argument against retroactive application. Insofar as the respondents' reliance upon prior precedent is concerned, the *Doyle* decision appears to be the logical successor to the Court's opinion in *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966). Insofar as "the effect on the administration of justice" by virtue of retroactive application of *Doyle* is concerned, we have no reason to believe that there have been "countless trials" where there has been prosecutorial reference to a defendant's post-arrest silence. Illinois law prior to *Doyle* had apparently already held it to be reversible error to bring out the fact of a defendant's silence at the time of arrest. *People v. Rothe*, 358 Ill. 52, 57, 192 N.E. 777 (1934).

Accordingly, were the question of retroactivity properly before us, we would hold *Doyle* retroactive to apply to this case.

Accordingly, petitioner's motion for summary judgment is granted, and the judgment of conviction is vacated. However, the writ of habeas corpus shall not issue for a period of 120 days in order to afford the State of Illinois the opportunity to initiate new trial proceedings. If petitioner is not brought to trial within 120 days from the date of this order, the writ shall issue.

An appropriate order will enter.

/s/ HUBERT L. WILL
United States District Judge

DATED: AUG. 21, 1979

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit